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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his Guardian ad Litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

PETITION, BRIEF AND ARGUMENT OF *AMICUS CURIAE*

SVEINBJORN JOHNSON

Amicus Curiae

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Appellees.

PETITION, BRIEF AND ARGUMENT OF *AMICUS CURIAE*

PETITION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The undersigned begs leave to file the attached brief in the above entitled cause on some legal propositions which may become of controlling importance in the cause.

Whether the Board of Regents of the University of California have the power to maintain as a compulsory condition, either of matriculation or of remaining in the University of California, that young men, not excused therefrom for good cause shown, enroll in and pursue a minimum num-

ber of prescribed courses in military tactics, may turn on the proper interpretation of the language of the Land Grant College Act of July 2, 1862, commonly known as the Morrill Land Grant Act, concerning instruction in military tactics. Land Grant Colleges, hereinafter named, all of which are vitally interested in this subject because all have always construed the Morrill Land Grant Act to require that actual study of military tactics by male students enrolled in these colleges was and is an obligatory condition of the enjoyment of the trust created by the United States Government, have asked the undersigned to file a brief on the interpretation of the clauses thereof relating to military training. The question is not academic, but arises every year, in one form or another, in many of the Land Grant Colleges, and has been brought into Court more than once, though not finally adjudicated by any State Court of last resort, and never by this Court.

The appended brief is submitted in support of this petition and of the legal proposition that it was the intent and purpose of Congress, when the Land Grant Act of July 2, 1862, was enacted, that the beneficiary institutions maintain a reasonable number of compulsory courses of instruction in military tactics. The Land Grant Colleges which have joined in the request to the author that this brief be filed are the following:

Purdue University
University of Arizona
Rhode Island State College
Texas A. & M. College
Montana State College
South Dakota State College
University of Maryland
University of Minnesota
Kansas State College
University of Florida
Connecticut State College
Michigan State College
University of Arkansas
University of Wyoming
Virginia Polytechnic Institute

Respectfully submitted,
SVEINBJORN JOHNSON,
Amicus Curiae.

BRIEF OF AMICUS CURIAE

Opinion Below

The opinion of the Supreme Court of California is reported in 87 Calif. Dec. 88.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code, as amended by Acts of February 13, 1926, January 31, 1928, and April 26, 1928.

Question Presented

Whether under 12 Stat. 503, (Morrill Land-Grant Act of Congress), Act of July 2, 1862, and the Organic Act of the University of California, California Statutes, 1868, p. 248, Sections 3 and 6, and Regulations of the Board of Regents of the University of California, the appellants may be excluded from enrollment in and attendance at the University of California.

Statutes Involved

The statutes involved are printed in Respondent's Brief; the federal statute involved in the discussion in this brief is printed on page ... hereof, and is the Act of July 2, 1862, 12 Stat. 503, 504.

Summary of Argument

Under the war power Congress provides that in land-grant colleges, organized pursuant to 12 Stat. 503-505, U. S. Code, Title 7, C. 13, Sec. 304 (the Morrill Land Grant Act of July 2, 1862), it is obligatory upon the beneficiary institutions to require all male students enrolled therein, unless excused for good cause shown, to pursue a certain reasonable

minimum of courses in military tactics, and no constitutional right to be exempt from pursuing such courses exists either upon the ground of conscientious scruples, or otherwise.

Introductory Statement

It is not the purpose of *amicus curiae* to examine closely the position taken by the appellants and the grounds urged by them in support of the contention that the University of California, in excluding them from attendance at the University, acted in excess of its powers. That branch of the argument is the peculiar province of counsel for the University. The fundamental position taken by appellants seems to be that by action of the University of California their religious freedom has been infringed in contravention of the Fourteenth Amendment. This contention *amicus curiae* will not discuss in detail, though the fallacy of the position, as it appears to this writer, will be pointed out in a general statement.

The appellants seek to achieve in the guise of religious liberty that which Mr. Gilbert, in Gilbert v. State of Minnesota, 254 U. S. 326, unsuccessfully attempted to accomplish in the name of free speech—to undermine the efforts of the State to cooperate with the national government in the matter of the national defense. It is asserted that it is sought to compel the appellants to enter the service of the United States Government by requiring them to pursue courses in military tactics in the R. O. T. C. and that this amounts to an infringement of religious liberty, which, it is claimed, is protected under the Fourteenth Amendment, a denial of due process of law, and a violation of the provileges and immunities clause. It is said that the State has no power to compel citizens of the United States to enter any branch of the service of the United States; and it is asserted, as we understand it, that it is an infringement of the guaranty of re-

ligious liberty which, we are told, is protected against national and State action by the First and the Fourteenth Amendments, to force conscientious objectors, which the appellants claim to be, to pursue courses in military tactics in the University of California. It is pointed out that no state of war, or threat of war, exists and that the State of California is not requiring its young men to pursue courses in military tactics in order to defend itself or its citizens against actual or anticipated attack.

From these contentions it is deduced that the State University is without power to maintain the educational policy described, and to exclude appellants for non-conformity. As regards due process, involving in fundamental essence the question whether the action challenged is *reasonable*, appellants make no inquiry into the circumstances in order to determine whether, in their light, it may be said that the legislative body acted reasonably. When we think of the Civil War, the reverses in which inspired the military training clauses in the Morrill Act, and the conditions immediately following its close, it is difficult to take seriously the argument that the action of Congress and of California was not eminently reasonable.

It may be assumed, as this court did (although at that time it did not so decide), in Gitlow v. New York, 268 U. S. 652, at page 666, that the due process clause of the Fourteenth Amendment protects citizens of the United States against State action calculated to restrict the privilege of free speech; it appears also to the writer of this brief that it may be conceded, for the purpose of this argument, that the concept of religious liberty is likewise within the protection of the Fourteenth Amendment. This concession is not binding upon counsel for the University of California, and is probably of little importance in the case. Nevertheless,

amicus curiae, for the sake of the discussion to follow, concedes the point without further argument.

General Statement of Applicable Principles

The position of *amicus curiae* upon the merits of the whole case may be stated briefly under the following heads:

1. Under Article II, section 8, Congress has the power to declare war, to raise and support armies and to make rules for the government and regulation of the land and naval forces of the United States; it has the power to provide for calling forth the militia to execute the laws of the Union, and to suppress insurrections and repel invasions. In short, it has the power to provide for the training of officers and privates.

2. The writer assumes that it will not be seriously disputed by any responsible member of the bar that Congress, in enacting the Morrill Land Grant Act of 1862, when it made provisions therein for military training, had power to do so under Article II, section 8, supra, relating to the organizing of the army and provisions relating to national defense. In other words, the clauses in that act relating to military training in the Land Grant Colleges are undoubtedly supportable by reference to the war power. This subject, being obviously elementary, will not be pursued further.

3. Congress has power to authorize cooperative action by the States in connection with the recruiting of the army, the training of officers, and, in general, the making of adequate preparations for national defense. Although, of course, it may be conceded for the purpose of this discussion that with respect to war and the preparation for war, the power of Congress is exclusive, nevertheless that Congress may permit the States to exercise certain functions in this behalf,

will not be challenged. The National Defense Act of 1920 created a

> "definite military policy of the Nation . . . . The objective was the preparation of young men as reserve officers . . . . The military departments in the land-grant colleges became integral parts of the plans for national defense." U. S. Dept. of the Interior, Bull. 9, Vol. II, Pt. IV, p. 300, 301.

4. Congress, in the Morrill Act, for a valuable consideration, granted certain powers to and imposed certain obligations on the State concerning preparedness against war with respect to the colleges which might be established pursuant to the act.

5. The States have made provisions to carry out the Morrill Act, have exercised the power which Congress clearly intended that they should exercise under that law, and have maintained a system of compulsory military instruction in the colleges since the act was passed. The Supreme Court of California has held that the Statute and the Regulations of the Regents thereunder, are constitutional.

These five propositions seem to the writer elementary and indisputable.

Power of Congress to Induce State Cooperation For Defense, Not Open to Question

Counsel for the appellants, in the copy of the Petition for Appeal and the brief in support thereof, which this writer saw, do not deny or question the power of Congress to enact the Morrill Act of 1862 and to authorize the States to cooperate with the National Government in training persons for the military service in the manner indicated in the Act. The writer deems this question of power so free from doubt that it will not be pursued further. No *delegation* of power

by Congress is involved; it is simply a question whether Congress, in the reasonable exertion of the war power, may, for a consideration, in the matter of training young men, induce State cooperation in the field of national defense. That Congress may constitutionally do so, has never been and cannot now be seriously challenged.

Power of States to Accept Morrill Act, Cannot Be Challenged

Neither, as the writer understands, do appellants deny that the States had the power to *accept* the provisions of the Morrill Act, found colleges in compliance with its terms, receive the funds from the Federal Government, and maintain a system of military training therein in some form, as contemplated by this Act. The existence of such power must be assumed in the circumstances. It would be rather late now to raise the issue seriously. Obviously, the States could found colleges at their pleasure and prescribe in the curricula that certain courses be taught therein. As more fully appears later in this brief, rigidly prescribed curricula were the rule when the Morrill Act was passed. No departure from an educational policy, virtually universal, was contemplated.

Appellants' Positions Simmers Down to Issue of Religious Freedom

State power to provide military training in these colleges, as evidenced by the Morrill Act of 1862, (12 Stat. 503-504), the Act of 1866, (14 Stat. 336), permitting assignment of army officers as professors of military science, and the National Defense Act of June 4, 1920, (41 Stat. 759), must, we think, be conceded; so must also be conceded the proposition that the States may in part effectuate their obligations

under the Morrill Act through cooperation with the national government through the R. O. T. C., by virtue of congressional authorization. There is plainly no abridgement of the privileges and immunities of appellants as citizens because of their exclusion on account of nonconformity. The privileges and immunities clause cannot be invoked to nullify another specific grant of power, such as the war power. Adair v. United States, 208 U. S. 161, 180.

The fact that military tactics is *compulsory,* then, seems immaterial, except upon the contention that cnscientious objectors are denied religious liberty within the protection of the Fourteenth Amendment. This seems the most plausible ground on which appellants stand. If the States have the power—and it is their legal duty in any event, to go this far —to *offer* courses in military training, pursuant to the moral obligations resting upon the State under the Morrill Land Grant Act, it would seem to be equally within their power to make such attendance *compulsory,* whether the Morrill Act contemplates compulsion, or not. This they have done. Nothing in the Land Grant Act restricts the power of the States in this regard. If there be any limitation upon the power anywhere, and if the power may not be exerted as it was in California, it must be because the Constitution of the United States contains an inhibition, express or implied. No express inhibition exists; the sole contention which merits serious attention seems to be that the Fourteenth Amendment renders void the statute of California and the regulations of the Regents thereunder as an infringement of religious liberty.

In its essence the holding in Gilbert v. Minnesota, 254 U. S. 326, supports the foregoing when it points out that the States have a definite interest in the national defense. The argument of the appellant is, in part at least, predicted on

the position—as was Gilbert's in the cited case—"that a State has no interest or concern in the United States or its armies or power of protecting them from public enemies." 254 U. S. p. 328. The technical argument of appellants here leads to this conclusion as it led to it in Gilbert's case.

> This court said: "Undoubtedly, the United States can declare war and it, not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them—whether it is repellant and adverse or eager and militant; and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States, is a service of patriotism; and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the soverignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all . . . . This was the view of the Supreme Court of the State, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in State v. Holm, 139 Minnesota, 267, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that

> the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty . . . . Numerous cases were cited commencing with Moore v. Illinois, 14 How. 13, and terminating with Halter v. Nebraska, 205 U. S. 34.
>
> "The latter case is especially pertinent in its sentiment and reasoning. It sustained a statute of Nebraska directed against the debasement of the National flag to trade uses against the contention that the flag being the National emblem was subject only to the control of the National power. In sustaining the statute it was recognized that in a degradation of the flag there is a degradation of all of which it is a symbol, that is, 'the National power and National honor' and what they represent and have in trust. To maintain and reverence these, to 'encourage patriotism and love of country among its people,' may be affirmed, it was said, to be a duty that rests upon each State, and that 'when, by its legislation, the State encourages a feeling of patriotism towards the Nation, it necessarily encourages a like feeling towards the State.' "

The contention of appellants that California may not make "the national purposes its own" in so far as these are expressed in the Morrill Act and later Congressional Acts to which reference has been made, and require its citizens who take advantage of the *privilege* (Waugh v. Mississippi University, 237 U. S. 589) of attending the State University, to study prescribed courses in military tactics, is untenable in the light of the Gilbert case; and the objection that the States are trespassing on Congressional power, in the form suggested by the dissenting Chief Justice and by Mr. Justice Brandeis in the Gilbert case, is met by the fact that Congress not only both *expressly* and *impliedly* empowered the States to *cooperate* with the Nation in the matter of training prospective soldiers and officers for the army, but *invited*

them to do so by inducements contained in the Morrill Act, indeed, made such cooperation a condition precedent to the right to enjoy the bounties of the Act.

Appellants' Contention Re Religious Liberty Untenable

It is the contention of *amicus curiae* that, inasmuch as the California statute and the action of the Regents thereunder is justifiable under the war power, and the grant of power to the States by Congress, the language of this court in United States v. Macintosh, 283 U. S. 605, is controlling against the appellants upon the only point having even plausible merit, namely that they are conscientious objectors. The fact that this was an alien case is unimportant. The language was deliberately chosen, is pat, and should be controlling in this case.

The position of appellants that they are conscientious objectors and that therefore California, in excluding them from the University, because they refuse to take military tactics, infringed the right of religious freedom, alleged to be specially secured them by the Fourteenth Amendment, is not tenable either on principle or authority. It has never been held by this court that the privilege of the conscientious objector to avoid bearing arms comes from the Constitution; during the entire history of this country that privilege has come from acts of Congress and not from the fundamental law. It is true that in many States Constitutions have contained language doubtless intended to insure that true conscientious objectors would not be subjected to the bearing of arms in violation of their conscience. It has never been held, however, either under the First or the Fourteenth Amendments, that the United States Constitution protected the citizen against this obligation of his status.

In Jacobson v. Massachusetts, 197 U. S. 11, at p. 29, this

Court, in speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said: ". . . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

In United States v. Macintosh, supra, at page 624, this court said: "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general."

When one speaks of the will of God, one speaks in impressive language. When a man claims that his conscience as a Christian or as a religious man, will not permit him either to take military training in college or to take up arms for his country in case of attack, he must be accorded the benefit of whatever doubt the average person may entertain because of inability to understand the mental or spiritual attitude which dictates such a course. Appellants in this case are members of the Methodist Episcopal Church, a Christian denomination. Historically Christianity obtained its foothold in most of the civilized countries of Europe by the power of the sword. And when it is suggested that the obligation of citizenship must be held subordinate to the obli-

gations to God, let it not be forgotten that the Founder of Christianity Himself said, "Render unto Caesar the things that are Caesar's, and unto God the things that are God's." Christ Himself recognized the obligation of the subject to the sovereign and did not attempt to belittle the force of the duty of the citizen to the State. When the Methodist Episcopal Church in 1932 at its General Conference undertook to make military training a matter of conscience and thereby to protect the vast number of its adherents, young and old, against the obligation under the laws of many States to take military training in certain of its colleges, they laid the foundation of a claim, if approved by the courts, which may result in a complete paralysis of the government in time of war and render it impotent to repel enemies in case of attack. If a mere pronouncement by the General Conference of this great body or by the general body of any of our Christian denominations, be sufficient to establish opposition to war and preparations for war as a religious tenet of the church, then all other denominations can withdraw from the reach of the United States Government in any crisis the major portion of that part of the population which normally would bear arms. It is not for one moment believed that this pronouncement of the General Conference reflects the deliberate sentiments of the millions of fine citizens who constitute the general membership of the Methodist Church.

Whatever may be the facts with respect to the sincerity of the appellants in this case, and the writer of this brief raises no challenge against them on this score, it is nevertheless a fact of far-reaching significance that if their contention prevails in this Court the result will be to make it possible to withdraw the main defensive strength of the United States from the reach of the Government in any military crisis. It is respectfully submitted that if there be any doubt on the

score of the soundness of the appellants' claim that doubt should be resolved in favor of the United States and of the principle on which it rests its power to protect its own integrity and the lives of its own citizens in case of war.

May the Land Grant Colleges Make Study of Military Tactics a Condition of Matriculation, or of Remaining in School?

This is the point of principal concern to *amicus curiae*. It is the position of the writer that it was the intent and purpose of Congress when the Morrill Act was passed that study of military tactics be compulsory; and that this was uniformly the interpretation of State and National Officers, concerned with the administration of the law for over sixty years, until recent agitation against war sought to force on the country a contrary conclusion. Clearly, if compulsory military tactics be an obligation of the original grant, appellants have no standing on any theory except that the action complained against is an unconstitutional infringement of religious freedom.

The Language of the Act

Section 4 of the original land-grant (Morrill) act reads:

> 1. "Sec. 4. And be it further enacted, That all money derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land script hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the money so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in sec 5 of this act), and

> the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance of at least one college where the leading *object shall be,* without excluding other scientific and classical studies, and *including military tactics, to teach* such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life." 12 U. S. Sts. ch. 130 sec. 4 p. 503.

The act is *general* in its requirements concerning "agriculture and the mechanic arts," but it becomes *specific* respecting military tactics by mentioning by *name* a *course* at that time rather restricted in scope and content. In the former general field, much latitude was allowed and intended; in the latter, no latitude is given, but the subject named must be *taught,* not just *listed* to be pursued at the option of the students.

The language of the law seems so plain as to exclude the need of refinements in interpretation. The second clause, emphasized above, was introduced into the bill for the first time in 1862. It had not appeared in this section of the bill, virtually identical in other respects, which President Buchanan vetoed on February 24, 1859. The fact that the language was interpolated doubtless explains the somewhat awkward phraseology.

There were main or primary purposes which the Congress of 1862 wanted to accomplish, one, widespread education calculated to develop proficiency in the mechanic arts and more scientific agricultural methods, and, the other, such military training that there would always be scattered throughout the nation a number of men so grounded in the principles of military science that no emergency would again

find the country so woefully deficient in the materials out of which efficient officers and privates can be readily and hurriedly made as had been the case in 1861. Such appears to be the plain meaning of the law.

The act makes it the duty of the beneficiaries *"to teach" military tactics*. There can be no teaching of a subject without students. If, therefore, there be a legal duty to *teach* a *specified* subject in a certain institution, is there any escape from the conclusion that it also is the legal duty of that institution to *require* students therein to take the *subject* which it is under an obligation to teach? To answer this in the negative is to convict the men who framed the law of an absurdity. They knew the English language as well as we do; they knew that *at that time* "to teach" did not mean the same as "to offer" optional courses, for electives in the first two years were practically unknown. If a college accepted the act it *agreed "to teach" military tactics;* it, therefore, necessarily agreed to *require* male students to take the course, for otherwise it would be impossible to carry out an unconditional promise to teach it; and such for sixty years, was the universal understanding.

Elective System Virtually Unknown in 1862

The fallacy of the position that it is not the duty of the beneficiary colleges to teach military tactics to all students therein, unless excused for cause, becomes obvious when the language of the act is studied in connection with the prevailing educational practices and methods at the time of its passage. *The leading colleges and universities in the country at that time were either without electives of any sort in their curricula, or the privilege to make a choice of subjects or courses was restricted within very narrow limits in the Junior or Senior years.* The only noteworthy exception was

the University of Virginia, which, under the leadership of Jefferson, opened with an extensive elective system in 1825.

The catalogue of Yale, for the year 1862-1863, maps a four year curriculum without a single elective, except in the case of students who desire to pursue the higher branches of mathematics who were permitted, during the first two terms of the junior year, to choose differential and integral calculus in lieu of Latin and Greek. The catalogue of the Massachusetts Institute of Technology, for the year 1866-1867, shows *no electives,* save one specialty in a professional course. The Harvard catalogue for 1860-1861 and 1863-1864 has a rigidly prescribed course for the first two years, permitting only a very limited choice of courses in the junior and senior years. On October 19, 1869 President Eliot said in his inaugural address, among other things, "At present the freshman year is the only one in which there is a fixed course prescribed for all." The fight for the elective system at Harvard—then the leader in education—had been going on for some time. Seven years before, as stated, this educational leader among the schools had virtually no electives in its curriculum. Significantly, the elective system first crept into the *senior,* then the *junior,* then the *sophomore,* and finally the *freshman* year, whereas military training was always and uniformly required in the *freshman* and *sophomore* years. With this situation the members of Congress were fully familiar. At Harvard the senior year became elective in 1872, the junior in 1879, the sophomore in 1884, and in 1894 the system had been completely adopted. Administration of the College Curriculum, William T. Foster, p. 128, and *passim.* Precisely the same is true of the Iowa University course for 1873; and the University of Michigan, in 1865, permitted no choice before the senior year, and then only within sharp limitations.

When the act was written, electives in freshman or sophomore curricula were virtually unknown, and when electives were permitted anywhere, special fees were usually charged; a fully prescribed and rigidly required course was the general rule. Had Congress intended that the beneficiary colleges merely introduce military tactics as an *elective course*, thereby making a departure from the general rule in educational theory and practice, explicit language, disclosing such intent, would have been used. Congress would not have made it a duty "to teach" military tactics, but rather to add it as an elective in the first, second or later years. Logically such training should be begun in the first year; but in no college of recognized standing of that day, except the University of Virginia, it is believed, were electives found in the first two years. The language used by Mr. Morrill, later quoted herein, clearly shows that he and his associates in Congress understood that "to teach" meant just what it says, a duty to *require* students in these colleges to *study* military tactics.

Contemporaneous History

The foregoing conclusion as to the real purpose and intent of Congress, to which the language of the act leads, finds ample support in the conditions and circumstances under which the law was passed, and they must be considered in order to reach a correct result. Of course, the object of all legal rules of statutory interpretation is to ascertain and give effect to the legislative will.

Justin S. Morrill of Vermont was the chief sponsor of the bill and its leading spokesman in Congress. The cold record leaves no room for doubt respecting his understanding of the purpose of the clause concerning military tactics.

Speaking on the Senate bill, which less than a month afterwards became a law, he said:

> "Something of military instruction has been incorporated in the bill in consequence of the new conviction of its necessity forced upon the attention of the loyal states by the history of the past year. A total unpreparedness presents too many temptations, even to a foe otherwise weak. The national school at West Point may suffice for the regular army in ordinary years of peace, but it is *wholly inadequate* when a large army is to be suddenly put into service. If we ever expect to reduce the army to its old dimension and again rely on the volunteer system for defense, *each state must have the means within itself to organize and officer its own force.* With such a system as that here offered —nurseries in every state—*a sufficient force would at all times be ready to support the cause of the nation and secure that wholesome respect which belongs to a people whose power is always equal to its pretensions* . . . ."
>
> See Cong. Globe 37th Cong. 2d Sess. Pt. 4, App. p. 256.

"In a free government we have proved, notwithstanding some 'in time of temptation fall away,' that patriotism is spontaneous, but doubtless many valuable lives would have been saved in the progress of this plague-spotted rebellion had we not so long assumed that military discipline was also spontaneous. If ever again our legions are summoned to the field, let us show that we are not wholly unprepared. These colleges founded in every state will . . . to some extent guard against the sheer ignorance of all military art which shrouded the country, and especially the North, at the time when the tocsin of war sounded at Fort Sumter." U. S. Experiment Stations Office Bulletin 152-157, p. 91.

"Mr. Morrill, the author of the bill, in making his great speech on this subject, said: while the world is

> in a transition state and all lands do not yet rest from war, the art cannot be wholly neglected, inasmuch as it is still true that, 'one sword keeps another in its scabbard,' and therefore something of military science and discipline as an incident of these national colleges is provided for and *will be obtained by all of their students,* supplying in an emergency to each state a valuable aggregate of available knowledge, and that without any charge to the national government." Hearings before the Committee on Military Affairs, H. R. 8538, 1st Sess., 69th Cong. (1926).

It is plain from the language used by Mr. Morrill that he understood that the provision for military tactics was not optional, but obligatory in the sense that there must be actual military training of all students in all Land Grant Colleges, for otherwise how could he feel sure that an "efficient force would at all times be ready," if the study of military science were optional with the students? Clearly, such language was wholly inapt had he supposed that it was optional with the colleges whether or no their students should study "military tactics." Indeed, experience since has demonstrated that the result of changing from the compulsory to the optional is to reduce the attendance in tactics about sixty per cent. While there still lingered some of the old opposition to the proposed distribution of the public lands, no one challenged the interpretation or the wisdom of the proposed measure concerning military tactics, as stated by Mr. Morrill.

Let us consider in more detail the history of the clause concerning military tactics. Mr. Morrill introduced a Land Grant College bill in the first session of the Thirty-fifth Congress, on December 14, 1857, when it was referred to the Committee on Public Lands. H. R. 2. The bill was adversely reported on April 15, 1858; Mr. Morrill amended

his bill by striking out everything after the title and inserting a new measure, on April 20, 1858, which amendment was agreed to on April 22, following. On the same day it passed the House. This substituted bill made no substantial changes in section 4 and in neither the original nor the amended bill is there any reference whatever to the teaching of military tactics. In all other respects, pertinent to the present inquiry, section 4 of this bill was identical with section 4 in the act which was approved on July 2, 1862. The measure passed both houses of Congress, but was vetoed by President Buchanan.

On January 15, 1862, the legislature of the State of Michigan passed a resolution calling on Congress to appropriate two hundred thousand acres of land to endow a military school in that State. The preamble recites the necessity, in view of the experience in the war, of diffusion of "knowledge of the science and art of war among the people." Misc. Doc. No. 38, 37th Cong., 2d Sess.

With the current reverses of the Civil War as a background and this resolution from the State of Michigan, and possibly demands of a like nature from other States before it, there was introduced in the Senate, on May 5, 1862, a land grant bill sponsored by Senator Benjamin F. Wade

the House a land grant measure (H. R. 138) which, on December 16, 1861, was read the first and second time. These bills were substantially identical in language and wholly so in purpose, with one important exception shortly to be noticed. In the bill introduced by Mr. Morrill the language concerning the subjects of instruction in and describing the purpose of the colleges to be established under the act, was as follows: ". . . where the leading object

shall be, without excluding other scientific and classical studies, and *without excluding military tactics,* to teach such branches of learning and mechanic arts as are related," etc. In the bill introduced by Mr. Wade, the permissive feature of the House Bill concerning military training, emphasized above, had disappeared and the language had become *mandatory in form,* exactly as it appears in the act approved by President Lincoln on the second of July, 1862, and set forth above.

It would seem, in view of this legislative history, that the purpose of Congress is not in doubt. Beginning as early as 1857, or before, with a measure making no reference to military training, we pass to a bill in the House, in December, 1861, which makes military training permissible and optional, and in precisely the same category as classical studies; but in May, 1862, we find the Senate bill unequivocally removing military tactics from the optional field and putting it on an obligatory basis.

President Buchanan had vetoed a similar bill on the general ground that Congress had no constitutional power thus to give away the public lands and that education was a State rather than a national function. In neither of these measures, however, had there been any reference to military

unanimous view of historians, that the Civil War had forcefully brought to mind the need for military education on a broader scale than was afforded by the institution at West Point, as Mr. Morrill indicates. The situation in 1862 was so manifestly grave that to guard against its recurrence in another crisis might well become one of the major objects of new legislation. Mr. Morrill spoke the minds of the times, and Senator Wade wrote into the act a provision which really constitutes the consideration to be received by

the nation at large for the liberal gift to such colleges, namely: that requiring the training of young men for the defense of the country.

Official Interpretation

Federal

In 1923 the Department of the Interior, which administers the act, in an opinion which makes no reference to the history of the act, the purpose of Congress, or the practical construction of the law for over sixty years, definitely held that Wisconsin did not lose benefits under the law by discontinuing military training as a compulsory, while retaining it as an optional, course. This was merely and purported to be no more than a declaration of *policy*. It was published in 1925. In 1930 an opinion signed by the Attorney General of the United States to the same general effect was promulgated. Consideration will be given to this opinion later in this brief.

On the other hand, the interpretation put upon the clause in question by the War Department has never been in doubt. It has always taken the position that it was obligatory not only to require all able-bodied male students, not excused for cause, to pursue a course of study in military education and training, but that the requirements of the law in this behalf were not met by perfunctory or merely colorable compliance with the letter of the act. It was in response to a letter in which the position was taken by the War Department that training was compulsory that the Interior Department stated its policy. Obviously, we are confronted by a question of law, not by one of policy. No department of the government has the legal power to waive any rights to which the Nation was entitled under the Morrill Act,

merely because it may be more comfortable or convenient as a matter of policy to do so.

The proceedings of the Association of American Agricultural Colleges and Experiment Stations unequivocally show that the War Department has steadily insisted that time should be liberally given to such instruction. Order No. 65, which was discussed at the meeting of this Association in 1904, indicates the attitude of the department on the subject. Speaking at that meeting, Mr. Patterson said:

> "When Order No. 65 came I had a conference with the Commandant, and I said, 'It matters not whether it subjects us to any inconvenience in other directions or not, you must carry out loyally the spirit of this order and its intent, and if five hours is not sufficient, you will have to take a sufficient amount of additional time from other duties connected with the college.' The military instruction is a popular feature in our institution." Bulletin No. 153, Offiice of Experiment Stations, p. 100.

That the army officers in charge of military education at some of the colleges were of the same opinion will appear later.

At this same session of the Association, Mr. Atherton, for the Committee on Military Instruction, said:

> "The chairman of the committee has had two prolonged interviews with the Chief of Staff of the army, the first of which resulted in an extension of the detail of military officers to colleges from two years to three, and the second in a better mutual understanding of some of the points at issue between the colleges and the department. The position of department, stated in the briefest form, is this, that, since the government furnishes officers and equipment for giving military instruction, it has a right to expect both a hearty cooperation and an equivalent return from the colleges:

> *That, since military instruction is the end sought by the law and by those who are charged with the administration of, it on behalf of the government,* that instruction should be made efficient, and the colleges should, as far as necessary, organize their schedules of work accordingly; and still further, that, while these details are of great advantage to the individual officers concerned, and thus to the entire military establishment, yet the primary need of the army is to have its officers directly at work with their respective commands. Ibid., 31, 32.

From Captain Ira L. Reeves, U. S. Army, in "Military Education in the United States," (1914): "Let it be understood that the only civil institutions of learning in the United States in which *instruction* in military science and tactics is *mandatory under the federal law are* the Land Grant Colleges." P. 79. The same view was taken by Brigadier General C. J. Bailey, U. S. Army, quoted idem, pp. 85, 86. He thought three hours per week the *minimum* to meet the requirements of the United States Government.

Major J. M. Lenihan, U. S. Army, said in 1910: "The law which *requires* that military instruction be *given* in Land-Grant College is contained in an act of Congress approved July 2, 1862, by President Lincoln . . ." Id. p. 86.

Captain Reeves: "By a land grant institution *instruction* in military tactics is required." Id., 248. This conviction runs all through this scholarly and complete work, and is many times expressed.

"They are *required* by federal law to give instruction in military science and tactics . . . ." Ransom, "Military Training," etc., p. 223.

"March 9, 1911. Approved by Secretary of War. Memorandum from Chief of Staff to Secretary of War.

"Lieutenant Mumma, P. M. S. & T., State University of Iowa, inquired if he had correctly interpreted War Department orders requiring a minimum of 3 hours per week to be devoted to Military Science and Tactics and that each and every student must do that amount of work to complete the requirement.

"Quote Memo:

" 'Par. 27 in General Orders No. 231, 1909, prescribes the minimum course . . . . This means that each student of the college will, during each of the two years of his college course, be required to receive military instruction during an equivalent of 84 hour periods. Failure on the part of the college authorities to require each student to devote this minimum of time to military instruction must be regarded by the War Department as a lack of compliance with its regulations.' "

Letter from Henry Breckenridge, Secretary of War, February 20, 1914, to Dr. George E. Vincent, President, University of Minnesota: "In response to your letter of December 1, 1913, asking for a War Department ruling upon the right of a State educational institution 'to exempt any of its first or second year students from military drill,' I have the honor to inform you as follows: . . . .

"While the University of Minnesota is a State institution, it nevertheless receives considerable support from federal funds, amounting to $137,529.17 a year; so from this you must see comes the obligation of the University and your responsibility as governing head of the institution to see that the requirements of par. 27, General Order No. 70, W. D. 1913, are carried out. In this paragraph no exception is made and *all students in their first and second years should receive the military drill and training as laid down in Revised Statutes 1225.* As long as the schools mentioned

in your letter receive federal funds it is clear that there should be corresponding assumption by these students of the obligations laid down in the original act of 1862. . . ." (Emphasis is ours.)

General Wood, speaking of need of 45,000 officers for contemplated army of 1,000,000 men, at hearing on Preparedness for National Defense: "We have got the material in part, under the Morrill Act, which was passed to meet a situation just such as would confront this country in case of war—absolute shortage of officers. We *established the land-grant agricultural colleges with compulsory military training.*" (Emphasis is ours.) Hearings, Com. on Military Affairs U. S. Senate, 1916, Parts I-XXI, p. 79.

Buchanan, in his veto of a bill virtually identical with the Morrill Act, save for the feature of military training, said: "It is true that the State legislatures are required to stipulate that they will faithfully execute the trust in the manner prescribed by the bill." Messages and Papers of the Presidents, Vol. VII, p. 3077. President Buchanan was clearly conscious of the fact that the States assumed an obligation in return for the bounty of the National Government.

The War Department was intimately concerned with the practical administration of this feature of the Morrill Act for more than half a century, before the Interior Department made its superficial pronouncement, but this practical interpretation the Attorney General ignored.

State

That the States, or their official spokesmen, supposed that one condition of the grant of federal aid was that military training be required of students attending the beneficiary colleges may be abundantly supported by citations to the public records. Only a few scattered references are possible.

Michigan. In the report of the United States Department of Agriculture for the year 1865, at page 166, Michigan reports among the general objects of the institution instruction in military tactics "as ***required*** by the act of Congress. The legislature, promptly at the first session following the approval of the act by President Lincoln, passed a law establishing a military school in connection with the Agricultural College, for the teaching of military tactics. Laws of 1863, p. 211. Obviously, the Michigan legislature was of the opinion that an obligation in this regard was assumed in accepting the act of Congress. This State, at that time, had little or no acquaintance with electives; as has been shown, its university permitted no choice during the first three years. Tactics have always been compulsory in Michigan.

In an early catalogue of the Michigan State Agricultural College (1864, p. 14) it is said that the act of Congress "contemplates ***instruction*** in military science." Of course, this does not mean electives, for reasons already given. Substantially this statement appears in later catalogues. In 1884 Lieutenant J. A. Lockwood was detailed by the President to Michigan. Military training is much emphasized in speaking of the purposes of the Michigan institution. No one can examine the early records of that state, concerning

the act of Congress, and come to any other conclusion than that giving instruction was deemed mandatory.

Minnesota. On May 7, 1869, a report on organization was made to the Board of Regents of Minnesota, in which this significant statement appears: "It is recommended that the Board of Regents meet the *requirements* of the law of Congress by making ample provision for instruction in military engineering . . ." Instruction is here assumed to be obligatory, for, of course, otherwise this language is inapt.

Iowa. The history of Iowa duplicates that of Michigan, Minnesota and other states. "All able-bodied male students of the College are expected to drill . . ." Fourth Biennial Report of the State Agricultural College, pp. 46, 47. This department, we are told, was established "pursuant to the act of Congress." As has been shown, there were no *electives* in the University of Iowa the first two years. Clearly, drill was obligatory to *all*, because such was supposed to be the meaning and intent of the law.

Arkansas. In Arkansas the situation was nearly the same as in Iowa, even to the language used. Report, United States Department of Agriculture (1874), p. 314. The same is substantially true of Vermont. *Ibid.*, p. 345.

West Virginia. On November 30, 1867, the governor of West Virginia reported to Schuyler Colfax, speaker of the house, that instruction was given in his college in "military tactics." He does not report that tactics has been introduced as an *elective*. House Misc. Doc. No. 21. 2nd sess., 40th Cong. "The National gift was, therefore, accepted by the legislature, and a Board appointed to organize the institution, with instruction to 'establish Departments

of Education in Literature, Science, Art, Agriculture, and Military Tactics . . .'" Catalog, 1879-1880.

Illinois. The record of Illinois is unequivocal. It has faithfully sought to carry out the real purpose of Congress without equivocation or evasion. In the act of the Illinois Legislature, adjourned February 28, 1867, providing for the organization and maintenance of the Illinois Industrial University, now, by legislative act, known as The University of Illinois, paragraph 13 reads as follows:

"The Board of Trustees *shall* by and with the advice and consent of the Governor and Adjutant General procure all such arms, accoutrements, books and instruments, and appoint such instructors, as may in their discretion, be *required to impart* a thorough knowledge of military tactics and military engineering, and they may prescribe a uniform dress to be worn by the pupils of the University."

In due time a uniform was prescribed for all students.

This act warrants the inference, in view of later official declarations, that in the minds of the members of the Legislature, the Trustees were bound, under the Land Grant College Act, to require military training.

At the first meeting of the Board of Trustees of the Illinois Industrial University a committee was appointed "on courses of study and faculty for the Illinois Industrial University." That committee consisted of Regent J. M. Gregory of the University, Newton Bateman, Mason Brayman, S. S. Hayes, and Willard C. Flagg. First Annual Report of the Board of Trustees of the University, pp. 47 ff. The membership of the committee shows that we can depend upon their report as a document of intelligence and understanding of the situation and the conditions under which the University was organized.

The committee, construing the language of the Con-

gressional act, says: "The military tactics are *required,* and the scientific and classical studies are permitted. Such at least is the *common* construction of these clauses . . ." *Ibid.,* p. 47. The committee was clearly conscious of the difference between *required* and *elective* courses.

General Brayman, in charge of military training at Illinois, calls attention to the compulsory nature of the requirement that military tactics shall be a part of the *prescribed* curriculum. *Ibid.,* pp. 80-82. The committee on the courses of study uses the following language:

"Military tactics being specifically required by the Act of Congress, the development of this department, to such an extent as may be found practicable, should be undertaken at the outset. While the effect of this department will be to scatter through the State a body of men, so far advanced in military art, that, in case of war, they will furnish skillful officers, ready to drill and lead the volunteer forces of the country, it is the opinion of many experienced educators that the introduction of the military drill and discipline is of positive value for their educating influence. They will materially assist in the government of the institution, and tend to form those habits of order and punctuality, for want of which so many educated men fail of usefulness and success." First Annual Report of Trustees, p. 51.

The "Committee on Military Department," of which General Brayman was chairman, made a report. *Ibid.,* pp. 80 ff. Here again, it appears that the contemporaneous interpretation of the Congressional act was that giving of military training was obligatory, and that the experience of the nation in the emergency of the Civil War inspired the plan for compulsory military education in the Land Grant Colleges. On page 85 a resolution appears, which was adopted by the board. The first paragraph reads: "Resolved, That in *compliance* with the *laws* on *that subject,*

the military department of this University shall be established as part of the regular and necessary means of education." It is impossible to read this report with an open mind and still to doubt that the trustees conceived it to be their duty to require military training under the act of Congress.

One of the ablest of the able men who have held the position of Superintendent of Public Instruction in the State of Illinois, is Dr. Newton Bateman. At the inaugural ceremonies of the university, March 11, 1868, he delivered an address in the course of which he said:

"The purposes for which this University was established, the work which it must do and may do, are here stated and defined, by the supreme and authoritative laws of Congress and of Illinois, in a manner so plain that only the most hopeless ignorance or willful perversity can misconstrue or misunderstand them.

"It will be seen that the law in respect to the instruction to be given in the University is two-fold, *mandatory* and *permissive*—certain things must be taught, certain other things are *not excluded*. Respecting the latter the Trustees seem to have discretion; they may provide for them or not, as they see fit; in respect to the former, they have no choice or discretion whatever, they must provide for them, or violate their oaths and the laws.

"The departments of instruction for which the Trustees are positively and peremptorily required to provide, and that "in the most thorough manner,' are two: 1. 'Such branches of learning as are related to agriculture and the mechanic arts,' and 2. 'Military tactics.'

"Instruction in these is a *sine qua non,* a condition precedent, default in which would work the forfeiture of the endowment." First Annual Report of the Board of Trustees, p. 163.

Fully acquainted with educational tendences and methods, a force in the field of education far beyond the borders

of his own state, Dr. Bateman speaks with striking force when it is recalled that electives were the decided exception and rigidly prescribed courses the rule. Only intellectual dishonesty of the most brazen type can read his remarks and then maintain that he meant merely that such a course should be *offered* as an *elective* and that thereby the obligation imposed by the act would be fully discharged.

In the memorial addressed by the Board of Trustees of the Industrial University to the members of the Legislature for the session of 1869, appear these words in connection with the explanation of the request for appropriations:

"There is also greatly needed a drill hall, for the military and other exercises in inclement weather and in the winter season. The importance of such a building has been acknowledged everywhere, and most of the older institutions are now provided with gymnasiums. In our State where the nature of the soil almost forbids outdoor exercise during so much of the winter and spring months, this is doubly important, and the military tactics *required by Congress* can scarcely be taught without it." Appendix, Second Annual Report of the Board of Trustees, p. 366.

In the second report of the Trustees of the Industrial University, 1869, at page 3, it was said: "It (the University) is required, under the Statutes of Incorporation, 'to teach, in the most thorough manner, such branches of learning as are related to Agriculture and the Mechanic Arts, and Military Tactics, without excluding other scientific and classical studies.'" And again, at page 14: "Under the authority of the act of incorporation, the Trustees have prescribed that all the students shall wear the University uniform."

In 1870, the Regent said: "I need not make any new argument in proof of the importance of this department. (Military.) It is sufficient that it is the requirement of

the *laws* of *Congress* and of the State, and must, therefore, receive our attention." Third Annual Report of the Board of Trustees (1870), p. 49. He is not speaking of elective courses.

Evidently, if all the students were required to wear the uniform they were required to take military training. Yet we are told that "according to the plan of the University the students have been left entirely free to select their own studies." Second Annual Report of the Board of Trustees (1869), p. 62. The inference is incontrovertible that since they were free to select their own studies but were not free to refuse to take military instruction that instruction was regarded by the Trustees as a prescription of the law.

General Brayman: "The country has a right to demand, as it has done, that those receiving the benefits of an education here, shall be prepared to render patriotic and skillful service in war, and no young man should be deprived of the honorable advantages which such instruction secures, should his service be required." Third Annual Report of the Board of Trustees (1870), p. 73.

Again: "The *teaching* of military tactics is *required* of the University both by the law of *Congress* and by the *State law.*" Fifth Annual Report of the Board of Trustees (1871-1872), p. 48.

In the Reorganization Act it was provided:

"All pupils attending the said University shall be taught and shall study such branches of learning as are related to agriculture and the mechanic arts and as are adapted to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life without excluding other scientific and classical studies and

including for all male students military tactics." State Laws of Illinois (1873), p. 16, sec. 6.

Here again contemporary construction is of the greatest importance. *When this reorganization act had been in force for a year,* we find the following significant and unequivocal language: "By the law of Congress *and of this state,* the University is *required* to *teach* military tactics to its male students." Eighth Report of the Board of Trustees, p. 64. These men would have been surprised had some one suggested that the law could be satisfied by merely *offering* an optional course.

Ohio. Mr. Merrick, at hearing before the House Military Affairs Committee on Bill for Abolishment of Compulsory Military Training, said: "Military training has been in effect at Ohio State University since 1873 and has continued throughout the decades up to the present time without a cessation of its being a requisite course of the curriculum except for a period of a little over one year. In 1879 the following report appeared relative to the last legislative act on military training.

"President Orton reported:

" 'By the action of the last legislature, military training was made voluntary on the part of the students. This action remands the drill to an inconspicuous and unimportant place in college life. Human nature being what it is, it is certain that no body of students will submit for any great length of time to the peremptory exactions of efficient military training unless they are obliged to do so. When obliged to submit, the great majority find no hardship in it, and drill in such circumstances becomes fairly popular.'

"This statement was made by Professor Orton, who was then acting president of the university.

"By the end of 1880 President Orton made the following report as regards the training:

" 'By the act of the legislature at its last session, the section in the organic law of the university, which forbade the making of military drill compulsory was repealed. At its June meeting the board took action upon the subject, making drill compulsory upon the male students of the institution, with the exception of the regular members of the senior and junior classes, and such other students as should be excused by the president on reasonable grounds.'

"It can be noted from this action of the legislature in 1880, that no alternative could be suited to the occasion if the Morrill Land-Grant Act was not to prove abortive in its purpose as regards military training. No deviation has been made from the requirement feature since its reinstatement in those early days of speculation." Hearings before the House Committee on Military Affairs, 69th Cong., 1926.

Dean Edward Orton of the College of Engineering, Ohio State University, said in 1913 in speaking of the obligatory features of the Morrill Act: "The chief motive for the insertion of the military-drill requirement in the Morrill Act was probably to strengthen our feeble military preparedness by the creation of a body of educated citizen soldiery which in times of war would become an asset of great value to us." He then points out that the Civil War disclosed the need, although good educational reasons exist, for "*exacting* drill in land-grant colleges." Washington Print. Office, 1914, p. 4.

"This great sum of money goes to a large group of land grant colleges which are required to *teach* military science as a *condition* of their existence." Id., p. 13.

The Secretary of War is quoted by Dean Orton as saying

that "the law requires that military education *be given* with a view to training young men to act as sub-alterns of volunteers." *Id.*, p. 13.

Alaska. Military courses have been offered from the beginning at the Alaska Agricultural College and School of Mines. Under the description of this department in the Catalog for 1934 is the following: "Under the Morrill Land Grant Act of 1862 military training is *required.* The training is designed primarily as a part of the program of national defense . . . . " Italics theirs.

California. Section 6 of the Organic Act of the University of California (1867-1868) provides: ". . . And in order to fulfill the requirements of the said Act . . . . all able-bodied male students . . shall *receive instruction* . . . in military tactics in such manner and to such extent as the Regents shall prescribe. . . ." The catalog of the University of California for 1870-1871 contains the following language: "Measures have been taken to carry out the provisions of the Act creating this University, in respect to military instruction and discipline. . . . All able-bodied male students of the University are *required* to attend the military exercises." (Italics ours.)

Colorado. The Catalog of the State Agricultural College of Colorado for 1883-1884 states that "Military training is required of all male students, unless excused for physical disability." In the Catalog for 1908-1909, it is stated that "By Act of Congress all agricultural colleges are required to *teach military science* and tactics." (Italics ours.)

Cornell. Paragraph 4 of the Charter of Cornell University (1865) provides: "The leading object of the corporation hereafter created shall be to teach such branches of learning as are related to agriculture and the mechanic arts,

including military tactics." In the Register for 1868-1869 we find this language: "The University owes it to the United States Government that due development and prominence be given to the departments of Agriculture and the Mechanic Arts, and that ample opportunity be also afforded for instruction in military science . . . . To this college is confided the execution of that provision of the national act of endowment which requires that instruction be given in military tactics."

Delaware. The University of Delaware states in its catalog for the year 1890: "By the Act of Congress, July 2d, 1862, . . . military science and tactics become a part of the work of instruction." In its catalog for 1882-1883 it had provided that "Drill will be required of all male students."

Georgia. In the Catalog, 1889-1890, of the Georgia State College of Agriculture, University of Georgia, it was said: "In accordance with the provisions of the Land Scrip Fund military exercises are regularly held in this college, upon which attendance is compulsory, except when a student is excused by the Faculty on the ground of physical disability."

Kansas. March 3, 1863, the legislature of Kansas assented to the conditions of the grant and assigned the benefits to the Kansas State Agricultural College. Section 5 of the Act of 1863 provides: "The college shall consist of four departments. 1st. The Department of Agriculture. 2d. Mechanic Arts. 3d. Military Science and Tactics. 4th. Literature and Science." General Davidson of the United States Army was to be detailed to the college as soon as "his previous army engagements were closed." And "All male students of the college, not disqualified or special-

ly excused, will be required to attend all military drills and exercises." Catalog, 1868.

Maine. We find this language in the Catalog of the University of Maine for the year 1879: "By the Act of Congress granting public lands for the endowment and maintenance of such colleges, it is provided that the leading object of such an institution shall be, 'without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts." In the Catalog for 1883 it is said, "All able-bodied male students receive instruction" in military tactics. And in the Catalog of 1897, "Each student is required to take (military tactics) unless physically unfit."

Maryland. In 1879 the Board of Trustees of the University of Maryland reported, "The Trustees desire to express their conviction of the beneficial results secured by the observance of the military feature required by Congress. . . ." Report of the Board of Trustees, 1879.

Nebraska. In the University of Nebraska Catalog, 1876, it is said, "The University is endowed under the provisions of this Act, and instruction in military tactics is therefore, necessarily, a part of its curriculum."

North Dakota. The North Dakota Agricultural College was established by Act of the legislature in 1890 to receive the benefits of the Morrill Act. "The Act of March 2, 1890, sets forth the purpose of such college and the character of the work as follows: 'The object of such college shall be to afford practical instruction in agriculture. . . . The course of instruction shall embrace . . . military tactics.' . . . . The law distinctly states that military

instruction shall be a part of the curriculum of the college. . . . All male students classified in any of the regular college courses are required to drill." Report of Board of Trustees, 1895.

Oklahoma. That 1909 Catalog of the Oklahoma Agricultural and Mechanical College states that "This institution being one of the beneficiaries of the Act of Congress of 1862, instruction in military tactics is made compulsory." The requirement to teach military tactics was not specifically mentioned in the charter of the institution, as it is in the majority of such institutions.

Oregon. In describing the department of military science and tactics of the Oregon State Agricultural College, it is said in the Catalog of 1888: "Instruction in this Department is both theoretical and practical and is required by the Act of Congress, which contributed so large a part of the College's endowment."

Pennsylvania. The Pennsylvania State College Catalog for 1865 states: "The Act of Congress granting land script to the several States for the support of Agricultural Colleges, requires that all Colleges which receive the benefit of that endowment shall give instruction in the Tactics and Army regulations of the United States." Students with conscientious scruples were exempted from the requirement. "This Act of Congress was, in 1863, 'accepted by the State of Pennsylvania, *with all its provisions* and conditions, and the faith of the State . . . pledged to carry the same into effect.'" Catalog, 1865.

Indiana. "In 1865 Indiana accepted and claimed benefits under the Acts of Congress of July 2, 1862, and April 4, 1864, and assented to all the conditions and provisions in said acts contained." The benefits were assigned to

Purdue University. "The Act of Congress endowing the University requires that Military Science and Tactics be taught." Catalog of Purdue University, 1914.

Rhode Island. "All men students are required to attend classes in military instruction." Rhode Island State College Catalog, 1904.

New Jersey. In 1864 the legislature of New Jersey passed an act assigning the grant under the Morrill Act to Rutgers University for the benefit of its College of Agriculture. Demarest in his "History of Rutgers College" at page 458, states: "The military department established and maintained in accordance with the requirement of the land grant act, became at this time (in the '80's) more formally and strongly organized. . . ." The Catalog of the University for 1871 states that military training is required of those registered in the scientific courses, that is, in the College of Agriculture.

Washington. Since the year 1903 at least the Catalog of the State College of Washington has contained the following: "By both the State and National laws affecting this institution, it is obligatory to give military training to all male students."

Wisconsin. Before Wisconsin changed its mind on the subject, it took the following position. "It is provided by law that 'all male students of the University, of whatever college, shall receive instruction and discipline in Military Tactics, the requisite arms for which shall be furnished by the State.'" Catalog 1866-67.

Interpretation by Private Individuals or Non-Official Organizations

If time and space permitted it would be possible to extend this brief almost indefinitely by quotations from private persons construing the federal act as obligatory in the sense here used. Only a few must suffice. They are selected on the theory that the men whose opinions are set forth gave the subject careful thought; indeed, some, due to public or semi-public positions held by them, were under a certain duty to think and write correctly about the matter.

At the first convention of delegates from the Land Grant Colleges, convened at Washington, D. C., in 1885, Professor B. Maurice of Maryland, says that: "2. Military tactics should *be taught* as *required.*" Bulletin, U. S. Department of Agriculture, Office of Experiment Stations (1885), p. 111.

He thought the curriculum should follow that of the naval academy quite closely. Again, he said: "Here are their agricultural barracks, and they are all under a strict military discipline; for we must not lose sight of the fact that the nation requires, in exchange for a liberal grant of land-scrips to agricultural institutions, that military tactics should be *taught* there besides agriculture and the mechanical arts . . . . " *Ibid.*, p. 133.

Again, in 1895 at the meeting of the Association of Agricultural Colleges, a delegate from Georgia voiced the same view concerning the obligation to teach military training. *Ibid.*, p. 77.

At the eighteenth annual convention of the Association of American Agricultural Colleges and Experiment Stations, at Des Moines in November, 1904, representatives of forty-

three states attended. The subject of military education in the Land Grant Colleges received no little attention.

Mr. Buckman (Vermont): "As we have seen, the incorporation of military instruction into the curriculum of the colleges was intended to meet one of the great and permanent needs of the country. *Such instruction is mandatory upon the colleges.* By the acceptance of the grant with its conditions this instruction has become an obligation, recognized as such by the colleges. So much—that the colleges shall give instruction in military tactics—is, so to speak, constitutional, *unalterable,* not *debatable.*" *Ibid.,* pp. 92, 93. From this strong and explicit statement concerning the obligation of the colleges under the act there was not a dissenting voice in that convention of representative and intelligent men. Indeed, every speaker took it for granted that Mr. Buckman correctly interpreted the law.

Mr. Thatch (Alabama): "The act of 1862 explicitly requires such training, and I do not believe that we can comply with the spirit, or the letter of the law, without having military instruction of a very definite and fixed amount and nature." *Ibid.,* p. 95.

Mr. Van Hise (Wisconsin), later president of the University, discussed the minimum time for military instruction which, in his judgment, would comply with the federal act. He thought two hours weekly sufficient. He spoke directly after Mr. Thatch, but in no way questioned or dissented from the latter's positive statement that military instruction was mandatory under the act. *Ibid.,* p. 95.

On February 15, 16, 17, 1872, a convention met at Washington on the call of the Commissioner of Agriculture. It was there resolved, among other things: "At the same time it (the act), contemplated wisely the fact that the citizen must also, when necessary, become the soldier, and that

while with one hand he would feed and clothe the nation, with the other he would bravely and skillfully defend it. Hence the *requirements* in regard to military education." Misc. Doc. No. 92, 42nd Cong., 2nd Sess.

On November 14, 1913, Dean Edward Orton of the College of Engineering of the University of Ohio, read a paper before the Association at its meeting at Washington, D. C., on the status of the military department in the Land Grant Colleges. Speaking of "military tactics," he then says, among other things: "There is nothing *permissive* or *optional about it*. It means that it was intended by the framers of the law that military instruction should be an integral part of the training given by every Land-Grant College." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1913), p. 172.

And again, speaking of the purpose of the government to strengthen "our feeble military preparedness by the creation of a body of educated citizen soldiery," he says: "This motive is still the most important one which can be brought forward from the government's side to justify the expenditure which the military drill feature of the Morrill Act specifically occasions." *Ibid.*, p. 173.

Again, he says:

"My next thesis is that it is just as important, or more so, to the country at large and the War Department in particular, that the military work of our Land Grant Colleges be strengthened as it is to the colleges themselves. The officials of the War Department look at the provisions of the Morrill Act and the acts of 1890 and 1907, as being intended to remedy the terrible shortage of officers felt in the Civil War and later in the Spanish War." *Ibid.*, p. 178.

Speaking of the attitude of the War Department, he quotes the following:

" 'In this connection it may not be improper to invite your

attention to the fact that there is now and has been for many years in each of the several States an agricultural and mechanical college aided by the Federal Government, where the *law requires that military education* be given with a view of training young men to act as subalterns of volunteers. These colleges were created by the Morrill Act of 1862 and were further endowed and supported by the second Morrill, the Nelson, and subsequent acts. By these acts Congress sought to prevent in the future the serious shortage of the Civil War in officers and provided liberally in funds for this purpose, and yet, in spite of the earnest endeavors of the War Department, extending over a period of years, the purpose of Congress has been largely defeated, while at the same time its appropriations have been used. This is due to the failure of the acts to be specific in stating what shall be done and the failure to provide a penalty for the institutions not carrying out the purpose of the acts.'" *Ibid.*, p. 180.

In 1916 Dean Orton again said:

"The Morrill Act of 1862 laid upon the educational institutions created under its provisions the obligation to give military instruction." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1916), p. 152.

In 1917 Edmund J. James, late President of the University of Illinois, speaking before the Association, said: "We have already established a definite idea in the minds of the people of this Republic that the Land Grant College is not only entitled to *require* a certain amount of military discipline from its students, but that it is morally *bound* to make and enforce such requirements because of the history of its origin and development." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1917), p. 165.

President James is here pleading for an honorable and

good faith performance of a definite obligation to render to the nation that which is due it for the great gift of lands.

In 1926, the Association resolved that it "go on record as favoring the amendment of the basic law governing military training in land grant institutions in any ways necessary." Proceedings, Association of American Agricultural Colleges and Experiment Stations (1927), p. 428.

Now, if the Association really believed it was full compliance with the "to teach" clause merely to offer optional courses to those who may or may not want them, what need is there for Amendment in this regard?

On January 10, 1929, Dr. W. O. Thompson, President Emeritus, Ohio State University, speaking before the assembled cadet corps at the University of Minnesota, said:

"The interpretation of this Act is important to its proper and complete understanding. The question of agriculture had been before the country, especially in Illinois and Michigan and in certain agricultural circles, for some time. When, however, the matter came up for consideration by Congress, the subject of mechanic arts was included because such vocations were considered to be a contribution to the national defense. The opposition to the Bill is not so important at this juncture but it is well to remember that the phrase 'without excluding other scientific and classical studies and including military tactics' was intended to do two things; first, to make it possible to teach outside of a strict interpretation of applied science and leave some discretion to the State; the second important fact is, that military tactics was included as a positive contribution to and an essential part of the Bill. Without these two features there is reason to believe that the Bill might not have been enacted into a law. Further the phrase 'in such manner as the legislatures of the States may respectitvely prescribe' was due to the fact that a strong factor in Congress recognized education as a state function. President Buchanan had vetoed this measure principally on the theory that the proposed legislation inter-

fered with the right of the States in education. The phrase under consideration was intended to prevent interference by the Federal Government and to protect the rights of the States in education which by many was regarded as a function of the State. *It forms no basis for the elective idea as applied to education in military tactics.*"

Again he says:

"As a further comment it may be added that the provisions of the Act of 1862 were accepted by all the States of the Union. These acceptances began at once and continued through a period of practically ten years, the time being extended by Congress an order to make abundant provision for every State in the Union to give the Act full consideration. It is important here to note that not a single State in the Union at the time of acceptance raised any objection to the subject of military science or military tactics as the statute expressed it. In other words this law as enacted was accepted by the States not on any theory of permission but on the theory of accepting a status universally recognized. That status was, that at least three things were to be taught; first, agriculture; second, mechanic arts; and third, military tactics. The phrase, 'without excluding other scientific and classical studies' permits the introduction of other than the three principal topics in the Act. Too often we overlook the fact that military tactics in the statute is on precisely the same basis as agriculture and the mechanic arts. Beyond question the country accepted those colleges on the ground that the three topics named were to be a part of the body of instruction in the colleges."

It would seem that enough has been said to show, almost to a demonstration, that the unambiguous language of the Morrill Act was understood, contemporaneously with and after its passage and approval, to impose a distinct and inescapable duty upon the colleges accepting its provisions to give instruction in "military tactics"; and that this duty could be satisfied, in accordance with the letter and the spirit of the law, by nothing less than an obligatory, as distin-

guished from an optional, course therein. Such is the testimony of the author of the law, of the War Department, and its representatives, of state legislatures and state officials charged with any duty in connection with the act, of private persons in public employment of representative associations; and such was clearly the supposed demand of the very emergency which resulted in the introduction of this obligatory clause into the act by Senator Wade. There is no need to resort to refinements in syntax or in the analysis of sentences from the grammarians' point of view. The language is plain; and the purpose, contemporaneously and subsequently expressed by responsible men and organizations, is even plainer. To exclude the light of contemporary and subsequent construction in extracting the purpose and intention of Congress is as unsound in law as it is indefensible in morals; and in such light but one conclusion is possible. One of the powerful arguments against similar bills, but without the clause concerning "military tactics," advanced by opponents in Congress, and by President Buchanan in his veto, was that the nation received nothing for this munificent gift. That position was completely and deliberately destroyed by the proponents of the Morrill Act; for in return for its bounty there would be in every state a "nursery" from which would come young men, fitted by special training, to become nuclei of a body of officers and private soldiers should the country again find itself at war.

The writer cannot forbear to pause a moment, before concluding this discussion, and focus attention upon two viewpoints which are usually ignored. In the first place, sober minded individuals, who have some acquaintance with other than the theoretical aspects of life, deny that there is any real force to the contention that two years of military tactics in college have the slightest tendency to create a "spirit of

militarism," whatever that vague and sonorous generality, as applied to our country, may mean. Any parent, who has taken conscious note of the shifting interests of his child, knows that the earliest proof that the glamor of struggle and conflict carries a strong appeal to the mind goes back to about the age of three or four. Swords, shields, guns, tin soldiers, all the implements of bloody war, are made in rough miniature and constitute the main attractions of the playroom. Why? Whence comes the inspiration to the young mind, scarcely yet in the twilight zone of awakening dawn? Is it some instinct primal; or is it the influence of the stirring tales of men and gods in mortal combat of which they hear from the old and beloved story books of childhood? Who knows? Perhaps next we shall have a "Committee of Censors of Nursery Rhymes and Tales." There will be some who will fervently praise Providence because their childhood is gone.

The mandatory requirement is in the law; and the States should not be encouraged to ignore it. The Supreme Court of Nebraska held expressly that the State is a trustee of the fund and is without power to divert it to any purposes other than those specified in the act. State v. Brian (Neb., 1909), 120 N. W. 916. In another case the State is held to be a trustee and the college the beneficiary. Yale College v. Sanger (1894), 62 Fed. 177, 185. This Court has said that the States should expend the funds "in accordance with the trust imposed upon them." Wyoming, etc. v. Irvine (1907), 51 L. ed. 1063. There is no escape from the conclusion that there is here an obligation closely akin to that of a conventional trust.

The Supreme Court of Massachusetts speaks of the "sacred trust under which the bounty of the general government was given." Massachusetts, etc. v. Marden (Mass,

1892), 30 N. E. 555. In the same case that great court virtually gives a judicial interpretation of the military tactics clause which fully supports our present contention. The court says that the legislature amended the charter of the Massachusetts Institute of Technology "so as to *require* it to *teach* military tactics in *conformity with the provisions of the act of Congress* . . . ." The contemporary catalogues of the Institute show that military training was required of all students accordingly.

36 Opinions of the Attorney General 297

On June 20, 1930 an opinion over the signature of Honorable William D. Mitchell was given the Secretary of the Interior, advising that "the policy of the Department of the Interior has been that a State fulfills its obligation under the law when it offers instruction and provides facilities for instruction in the branches of learning specified in the land-grant college legislation," that this policy was not in violation of the Morrill Land Grant Act of 1862 and that pursuant to this policy the Secretary was permitted to issue his certificate in conformity with the Act of Congress of March 4, 1907, to the effect that a State has complied with the Land Grant of 1862, notwithstanding military courses in its Land Grant College are optional rather than compulsory. The writer calls particular attention to the fact that this attitude is described as one of *policy*. The decision of the Attorney General was perhaps mainly rested on the proposition that after the policy of the Secretary of the Interior was published in 1925 Congress, in April, 1926, reenacted the fourth section of the Act of 1862 with the identical language unchanged, notwithstanding this interpretation. The Attorney General applied the principle laid down in National Lead Co. v. United States, 252 U. S. 140, 146-147; United

States v. Cerecedo Hermanos y. Compania, 209 U. S. 337, 339; United States v. Falk & Brothers, 204 U. S. 143, 149, to the effect that the reenactment of a statute while an administrative interpretation thereof is in effect, amounts to an implied legislative approval of the executive construction, for Congress is presumed to have legislated with knowledge of the established usage of an executive department.

On page 300 it is said in the opinion that the course in military tactics was compulsory in the years immediately following the passage of the act. In point of fact, military tactics was a compulsory course in all the Land Grant Colleges and has been compulsory until Wisconsin broke away in 1923, and Minnesota by action of the Regents, in 1934; and it is still compulsory in spite of the opinion of the Attorney General. In point of fact, the ruling has not been generally accepted as sound by the Colleges.

The Attorney General takes no notice of the fact that for sixty-eight years following the enactment of the Morrill Land Grant Act and for more than sixty years before the publication of the policy by the Department of the Interior, every official, State and National, concerned in the administration of the law, including the War Department and at least two Secretaries of War, interpreted this act to require that the courses be compulsory. The opinion concludes that the uniform interpretation of State and National officers of the highest integrity and ability shall be rendered nugatory and completely reversed because a political department of the Government, upon grounds of policy, reaches a contrary conclusion, and the year following the announcement of this conclusion, Congress inadvertently reenacts the statute in question without changing the phraseology. If this doctrine is to stand the test of this Court, it becomes a comparatively easy matter for a bureau or political branch of the Govern-

ment, by misinterpretation and the promulgation thereof, to amend in substantial particulars the deliberate enactment of Congress, unless by some chance Congress happens to come across the interpretation in time, in the mass of Governmental reports.

The cases relied on in the opinion of the Attorney General are important and ought to be considered. The leading case is doubtless National Lead Co. v. United States, supra. A brief quotation from the opinion of Mr. Justice Clark at once demonstrates the misrepresentative character of the position in this opinion as indicative of the true attitude of this Court. The language of the act there involved was concededly ambiguous. It had been interpreted a certain way for *almost forty years* by the Department of the Treasury; a contrary interpretation was insisted upon in the case before the Court. The interpretation of the Treasury Department was reasonable. The Court says:

> "From Edwards v. Darby, 12 Wheat. 206, to Jacobs v. Prichard, 223 U. S. 200, it has been the settled law that when uncertainty and ambiguity, such as we have here, is found in the statutes great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—*especially where such construction has been long continued*, as it was in this case for almost forty years before *the petition was filed.*" (Emphasis supplied.)

The contemporaneaus construction of the Land Grant Colleges; of the War Department; of officers of the United States Army of the highest rank and standing; and the continued interpretation for over sixty years, were entirely ignored by the gentleman who prepared this opinion for Attorney General Mitchell. Admitting that there is ambiguity in the Land Grand Act of 1862, purely

for the sake of the argument, that ambiguity, under the rule laid down by this Court and as stated above, has been settled by a construction which "has been long continued," to wit, for a period of more than sixty years; and the contrary interpretation promulgated by a political department of the Government had been announced for approximately one year when Congress reenacted the Statute and inadvertently overlooked the promulgation of a policy which appeared in a bulletin of the Bureau of Education.

In the case of United States v. Falk & Brother, 204 U. S. 143, also relied on in the opinion, it is to be noted that an opinion of the Attorney General in that case had been rendered and had been followed by the Department for *seven years* before it was challenged. At the end of the period of seven years Congress reenacted the statute without any change. It may be supposed that Congress will be on the watch for interpretation by the Department of Justice, solemnly made and printed in its opinions, and there is reason for holding, when such is the case and when the opinion of the Department of Justice has been acted on for seven years and Congress has reenacted the statute after that period without any change in the disputed language, that Congress knowingly and deliberately accepted the interpretation in the reenactment. No such situation or analogous situation confronted the Attorney General when the question on military training was submitted in 1930.

Attorney General Mitchell is an able lawyer and a conscientious man. It is, nevertheless, true, that it is physically impossible for the Attorney General of the United States to inquire personally into legal questions of the less important type. He must rely upon opinions prepared by subordinates in his Department. It is respectfully submitted that the opinion in this case not only does not do justice to the emi-

nent talent of Attorney General Mitchell, but it represents a perversion of the principles of the decisions of this Court and lays down a rule which, if sanctioned by this Court, will make it possible to amend the most solemnly enacted Congressional legislation by the interpretation of a political bureau, announced six months or a year before Congress inadvertently reenacts the same statute. No one can read the opinion without becoming convinced that Mr. Mitchell himself had no opportunity to go into the legislative history of the Morrill Land Grant Act, or of the contemporaneous and subsequent construction thereof by responsible officials of the State and of the National Government since its enactment and until Wisconsin departed from its own as well as the accepted interpretation by putting military training on an optional basis.

It is not wholly beside the point to advert briefly to the results of military training in the Land Grant Colleges. There served in the World War over 79,000 men who had been thus trained; according to imperfect and incomplete records over 800 thus trained served in the Spanish American War; and there served in the World War over 28,000 officers who had received their training in these schools. It is evident that the purpose of the Act has to some extent been realized since half of the men who served in the World War were officers, and more than half of the officers required to take charge of our armed forces during the World War secured their training in the Land Grant Colleges. It is, of course, perfectly well understood, and especially so by the opponents of military training in the Land Grant Colleges, that with the optional system in force, no such results, or anything approaching them, would have been or could have been shown. United States Depart-

ment of the Interior, Office of Education, Survey of Land-Grant Colleges and Universities, Section of Bulletin, 1930, No. 9, Vol. II, Part IV.

Respectfully submitted,

SVEINBJORN JOHNSON,

Amicus Curiae.

October, 1934.